85-1641

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

LINDA MULLIGAN,

Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHRYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK G. CLOPPERT, JR.
(Counsel of Record)
SUSAN TRUITT
CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
(614) 461-4455

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QUESTIONS PRESENTED

Without applying the analysis of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the court below held that the *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985) decision should be applied retroactively in all pending 42 U.S.C. Section 1983 and 1985 cases. The court chose to apply Ohio's one year statute of limitations regarding certain intentional torts, rather than Ohio's two year statute of limitations regarding personal injury, or Ohio's four year statute of limitations for injuries to rights not arising on contract, to bar petitioner's claims. On that basis, without a trial, the court rejected as time barred a tenured faculty member's claim that the respondents are presently restricting her tenure rights without a prior or a post hearing. The court also ruled that derogatory letters in petitioner's personnel file were time barred and did not violate petitioner's liberty interests, despite the fact that the petitioner could not and should not have discovered the existence of such letters until less than one year before the action was filed. The court further held that a derogatory letter written within one year of the time of filing also did not violate petitioner's liberty interests, because with material already in petitioner's file the most recent letter was merely cumulative. The questions presented by this decision are:

1. Is the court of appeals' precedent-setting decision to use *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983) to require retroactive application of the new one year statute of limitations in all pending Sections 1983 and 1985 cases, thereby automatically time barring all pending cases filed under and dependent upon pre-*Wilson* statutes of limitations, contrary to

this Court's decision in *Wilson* and in *Chevron, supra* and in conflict with the rulings of other federal courts of appeal applying *Wilson*?

2. Is the court of appeals' holding that the new statute of limitations in 42 U.S.C. Sections 1983 and 1985 cases should be taken from Ohio Revised Code ("Oh. Rev. Code") Section 2305.11, a one year period relating to certain intentional torts, rather than from Oh. Rev. Code Section 2305.10, a two year period relating to personal injury, or Oh. Rev. Code Section 2305.09, a four year period relating to certain torts, including injury to the rights of plaintiff not arising on contract, contrary to this Court's decision in *Wilson*?

3. Is the court of appeals' holding that a new statute of limitations retroactively time bars action by tenured faculty member against state university administrators for ongoing constitutional tort in conflict with the rulings of other courts of appeal with respect to ongoing constitutional tort?

4. Is the court of appeals' holding that an untenured faculty member accruing tenure in a public university cannot have a property interest in contractual agreements as to the type, location, or conditions of that accruing tenure in conflict with this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972) and the Fifth and Fourteenth Amendments to the United States Constitution?

5. In changing employee tenure system, is failure to give prior notice or hearing or subsequent notice that changes have been made contrary to the due process clause of the Fourteenth Amendment to the United States Constitution and contrary to this Court's decisions

in *Cleveland Board of Education v. Loudermill*, — U.S. —, 105 S. Ct. 1487 (1985) and *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1977), and can court below assert erroneous fact of notice contrary to the record?

6. Is a tenure system at a state university which restricts the rights, privileges, or activities of a faculty member to a specific site within the university in violation of the First Amendment Freedom of Speech and Fourteenth Amendment Equal Protection clauses, and in conflict with *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)?

7. Is the court of appeals' holding that the statute of limitations for rectifying a liberty interest violation begins to run from the time damaging material is placed in an employee's personnel file, rather than from the time that damaging material is or could have been discovered, contrary to this Court's holding in *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946)?

8. Is the court of appeals' holding that an employee's personnel file can be so falsely derogatory that adding additional false and derogatory material does not constitute a violation of liberty interests in conflict with the protections of the Fourteenth Amendment, in conflict with this Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop v. Wood*, 426 U.S. 341 (1976), and in conflict with the rulings of other federal courts of appeal with respect to continuing constitutional tort?

Rule 28.1 listing of corporate affiliates not applicable.

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FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHRYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Linda Mulligan hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for Sixth Circuit to review the judgment in *Mulligan v. Hazard, et al.*, 777 F.2d 340 (6th Cir. 1985); petition for rehearing and rehearing *en banc* denied January 7, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio is unreported and is reprinted at pages A-11-19 in a separately bound Appendix to this Petition (hereinafter "App."). The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 777 F.2d 340, and is reprinted at App. A-1-10.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 26, 1985. A timely petition for rehearing and rehearing *en banc* was denied on January 7, 1986. App. A-21. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

42 U.S.C. 1983, (App. A-23).

42 U.S.C. 1985, (App. A-24-25).

United States Constitution, First Amendment (App. A-22).

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United States Constitution, Fourteenth Amendment (App. A-22).

Ohio Revised Code ("Oh. Rev. Code").

Oh. Rev. Code Section 2305.06 (App. A-26).

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Oh. Rev. Code Section 2305.09 (App. A-28).

Oh. Rev. Code Section 2305.10 (App. A-29).

Oh. Rev. Code Section 2305.11 (App. A-30-33).

Oh. Rev. Code Section 2305.14 (App. A-34).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-3-35(B)10 (App A-35).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-5-01 (App. A-36).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-5-03 (App. A-37).

STATEMENT OF THE CASE

Statement of the Facts

Petitioner, Dr. Linda Mulligan, ("Mulligan") is a tenured Associate Professor in the Department of Sociology at the Ohio State University ("OSU"). Respondents are various OSU officials who have interpreted and applied tenure at OSU so as to restrict Mulligan's academic freedom rights and who have abridged her full tenure privileges.

OSU encompasses a number of campuses in five separate cities, yet is structured as a single integral university.

OSU includes a large central campus in Columbus, Ohio, and four small regional campuses in other cities. These campuses are academically and administratively integral; each of the academic disciplines in the University is represented by a single, multi-campus, academic department.

Mulligan was hired in 1973 by and in the academic Department of Sociology at the University. She was hired to perform three complementary responsibilities—teaching, research and service. Because the academic departments of OSU had teaching responsibilities on some or all of the five campuses, faculty were hired with the understanding that their classroom teaching responsibilities were to be at one of the five campuses of OSU. Mulligan received tenure in 1979 while teaching classes at the Marion Campus of OSU.

The research and service responsibilities of OSU faculty members were not campus-specific, nor could they be. Because OSU's four branch campuses were organized as integral parts of OSU, there were not any research facilities at the branch campuses.

The branch campuses were never separate academic units within the University. In 1980, after Mulligan received tenure in 1979, all four branch campuses were made academic units within the University, and renamed as regional campuses. At that same time Mulligan, already a member of the OSU Faculty and the OSU Department of Sociology Faculty, was in addition designated as a member of the Marion Regional Campus Faculty. A similar action was taken at that time with respect to all faculty teaching at the four OSU branch campuses.

Despite the fact that until 1980 there was no separate educational unit or academic faculty at the branch cam-

puses in which faculty could be tenured, in 1975 a plan for "campus-specific" tenure ("plan") was implemented by the respondents. This plan was never published in the OSU *By-Laws of The Board of Trustees* ("*By-Laws*") or in the *Rules of University Faculty* ("*Rules*")[1] No OSU faculty were afforded the opportunity to review or act on the proposed plan, nor were the faculty ever informed of the proposed change in tenure status. Mulligan was not aware of the proposed change until, at the earliest, 1980. Even then, the plan had not been published in either the *Rules* or the *By-Laws*. Mulligan first became aware of the plan due to the respondents' attempts to restrict her opportunities to fulfill her research and service obligations to the physical site of the Marion Campus.

Proceedings Below

Petitioner Mulligan filed this action on October 20, 1983. Before discovery was completed in the case the district court granted respondents' motion for summary judgment on May 15, 1984. The district court held that petitioner had not established a property right in unrestricted tenure, and that her liberty interests had not been violated. (App. A-11-17.) Mulligan's subsequent timely motion to vacate judgment was denied on June 14, 1984. (App. A-18-19.)

The questions before the appellate court were whether petitioner had a property right in unrestricted tenure; whether petitioner's right to academic freedom protected

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[1] When hired, Mulligan was told that the *Rules* and the *By-Laws* comprised the terms of her employment. There is an inherent requirement that any such rules must be published in a manner reasonably designed to come to the attention of, and be available to, all faculty.

by the First and Fourteenth Amendments had been violated; whether respondents conspired to infringe petitioner's tenure rights; and whether petitioner's liberty interests were violated by false materials in her personnel file.

The appellate court held that *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985) applied retroactively, and chose to apply a one year statute of limitations pertaining to malpractice, battery, and other intentional torts, bypassing a two year personal injury statute of limitations and a four year injury to rights not arising on contract statute of limitations, to bar petitioner's claims. (App. A-1-10.)

The court below also held that there was no violation of petitioner's liberty interests since the materials placed in her files within one year of filing suit were "merely cumulative" of prior derogatory material.

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REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's analysis in *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985), as well as the decisions of numerous courts of appeals, both by its choice of a one year limitations period pertaining to malpractice, battery, and other intentional torts when there was available a two year limitations period pertaining to personal injury, as well as a four year limitations period governing injury to rights not arising on contract, and by its failure to apply the analysis in *Chevron Oil v. Huson,* 404 U.S. 97 (1971) in applying *Wilson* retroactively.

Additionally, the appellate court's holding that false and derogatory material in a personnel file was not actionable and that additional false and derogatory material added to the file was merely cumulative is contrary to this Court's interpretation of liberty interests found in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Bishop v. Wood*, 426 U.S. 341 (1976).

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN WILSON AND THIS COURT'S ANALYSIS IN CHEVRON, AND IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

A. It was established in *Wilson* that each state's statute of limitations pertaining to personal injury would henceforth govern Section 1983 actions. *Wilson* did not determine what to do when, in a given state, more than one statute of limitations applied to personal injury actions. The court below applied a one year intentional tort applicable to libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice statute of limitations (Oh. Rev. Code Section 2305.11, App. A-30-33) when it had available to it a two year limitations period governing personal injury (Oh. Rev. Code Section 2305.10, App. A-29) and a four year limitations period governing injury to rights not arising on contract. (Oh. Rev. Code Section 2305.09, App. A-28).[2] The Sixth Circuit's choice

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[2] Ohio's statutes of limitations which also were arguably applicable include: Oh. Rev. Code Section 2305.06 (App. A-26): contract in writing, fifteen (15) years; Oh. Rev. Code Section 2305.07 (App. A-27): contract not in writing, six (6) years; Oh. Rev. Code Section 2305.14 (App. A-34): for other relief, ten (10) years.

of the statute of limitations to be applied is in direct conflict with decisions of other circuits.

1. In *Hamilton v. City of Overland Park*, 730 F.2d 613 (CA10 1984) (*en banc*), *cert. denied*, — U.S. —, 53 L.W. 3753 (1985) the court rejected, for Section 1983 purposes, Kansas' one year limitations statute for assault, battery, malicious prosecution or false imprisonment, and chose instead Kansas' two year limitations for injury to rights not arising on contract. The Tenth Circuit finds common law trespass statutes of limitations inappropriate for Section 1983 cases, applying instead the limitations period relating to personal injury.[3]

2. The court in *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (CA11 1985), *cert. denied*, — U.S. —, 54 L.W. 3497 (1986), applied a six year limitations period governing trespass, rather than a one year period for trespass on the case.

B. This Court established in *Chevron Oil Co., v. Huson*, 404 U.S. 97 (1971) a three-fold analysis to be examined when determining whether a new statute of limi-

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[3] See also, *Mismash v. Murray City*, 730 F.2d 1366 (CA10 1984) (*en banc*), *cert. denied*, — U.S. —, 53 L.W. 3753 (1985) (Utah's one year statute of limitations governing libel, slander, assault, battery, false imprisonment or seduction was rejected and, in the absence of an express limitations statute governing actions for injury to the rights of another, a four year limitations period for an action for relief not otherwise provided by law was applied); *McKay v. Hammock*, 730 F.2d 1367 (CA10 1984) (*en banc*) (applying Colorado's three year statute governing all actions for which no other limitation period is provided by law, rather than a one year period for trespass or a six year period for trespass on the case). All three of these Tenth Circuit cases were companion cases to the decision affirmed in *Wilson, supra*.

tations should be applied retroactively.[4] The first consideration under the *Chevron* analysis is whether the decision represents a "clear break" from past law, as *Wilson* certainly did.[5] The law at the time petitioner filed her suit was clearly that the most closely analogous state statute of limitations for the factual predicate of plaintiff's complaint should be used in Section 1983 actions. *Board of Regents v. Tomanio*, 446 U.S. 483 (1980); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 521 (CA6 1975). There were various statutes in Ohio which were arguably applicable, ranging from four years to fifteen years.[6] All of the prior Sixth Circuit decisions applying Ohio statutes

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4 The court below relied upon *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), instead of *Chevron* in its analysis. The retroactive application of a limitations period in *DelCostello* was based, in part, on the national labor policy promoting rapid resolution of labor disputes. There is no remotely comparable policy in Section 1983 cases which advocates speedy resolutions. Moreover, the decision in *DelCostello* was essentially foreshadowed by this Court's decision in *United Parcel Services, Inc. v. Mitchell*, 451 U.S. 56 (1981). Prior to *Wilson* there was no indication of Supreme Court disapproval of the method of borrowing the most analogous state statute of limitations in Section 1983 actions. The court below relied on the fact that this Court in *Wilson* applied the statute of limitations retroactively to the case before it. However, the claim in *Wilson* was not barred by the retroactive application of the personal injury statute of limitations; rather, in *Wilson* retroactive application of the new statute of limitations prevented the case from being time barred.

5 Justice O'Connor notes that *Wilson*, in abandoning the rule that a federal court adjudicating rights under Section 1983 will borrow the most closely analogous state statute of limitations, rejects a century old rule of law. *Wilson*, 105 S. Ct. at —, dissenting opinion.

6 See note 2, *supra*, and accompanying text.

of limitations to Section 1983 actions applied either a four year or a six year statute of limitations, except for Section 1983 actions for malicious prosecution or false imprisonment.[7]

The court chose, instead, to retroactively apply a narrow one year limitations period,[8] a clear break from the past. Moreover, the court below extended the new statute of limitations for Section 1983 cases to Section 1985 cases as well, an additional break with the past.[9]

The second *Chevron* factor is whether the retroactive application would further or hinder the operation of the newly-formed rule. One purpose of the rule in *Wilson, supra,* was the interest in uniformity, certainty and unnecessary litigation. *Wilson, supra,* 105 S. Ct. at 1947. Another policy consideration apparent when this Court chose the personal injury limitations period over other possible choices was to minimize the risk that states would provide limitations periods that were too short. *Wilson,*

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7 See note 11, *infra,* and accompanying text.

8 Instead of applying Oh. Rev. Code Section 2305.09 (App. A-28), a four year period for injury to the rights of plaintiff not arising on contract, or Oh. Rev. Code Section 2305.10 (App. A-29), a two year period for bodily injury or injury to personal property, the court below chose Oh. Rev. Code Section 2305.11 (App. A-30-33), a one year statute aimed narrowly at libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice actions.

9 Previously, the Sixth Circuit had definitively held the statute of limitations in Section 1985 cases to be different from the statutes of limitations in Section 1983 cases. See *An-Ti Chai v. Michigan Technological University,* 493 F. Supp. 1137 (W.D. Mich. 1980) app. dismissed, 727 F.2d 1108 (CA6 1984).

supra, 105 S. Ct. at 1949. One of the compelling policy considerations announced in *Wilson* was the importance of a Section 1983 remedy itself. The nature of a Section 1983 action deserves protection from undue haste in barring such claims. Retroactive application of *Wilson* to shorten a limitations period and bar a plaintiff his or her day in court would certainly hinder or retard one of the primary considerations of the *Wilson* decision, *i.e.*, the value of the Section 1983 remedy itself. As such, examination of the second prong of the *Chevron* test precludes retroactive application of *Wilson* to effect a shorter statute of limitations which would bar a plaintiff's case from court.

The third factor *Chevron* establishes is whether a retroactive application would provide substantially inequitable results. In the instant case, the results of retroactive application of the new rule of law, representing a clear break from the past, are substantially inequitable. Petitioner's claim has been barred by the retroactive application of a one year statute of limitations in the court below.[10] At the time petitioner filed the complaint in this case she justifiably relied on the clear rule of law that the state statute of limitations dealing with the most closely analogous claim applied at that time, which in her case

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[10] This Court quoted with approval the Tenth Circuit Court of Appeals that although it was establishing a new statute of limitations in Section 1983 actions it would not apply it retroactively to bar a litigant's right to their day in court when the action was timely under the law in effect at the time the suit was filed. *Wilson*, 105 S. Ct. at 1941 n 10; see also, *Gibson v. U.S.*, 781 F.2d 1334 (CA9 1986) (Actions which commence outside of the limitations period, but which continue into the limitations period, bring the claim within the limitations period).

would have been fifteen years for the portions of the claim depending on written contract, and four to ten years for the other parts of the claim. Petitioner Mulligan foreseeably relied on the consistent precedent in the Sixth Circuit that the shortest limitations period to be applied in her Section 1983 action would be four years.[11]

The decision in the court below is also in conflict with decisions among the circuits. Of the other courts of appeals all but the Third, Fifth, and Eighth Circuits have declined to apply *Wilson* retroactively to bar a plaintiff, who would not otherwise have been barred, their day in court.[12] Moreover, the Third and Eighth Circuits care-

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11 See, e.g., *Schorle v. City of Marine Hills,* 524 F. Supp. 821 (S. D. Oh. 1981) (applying four year period of Oh. Rev. Code Section 2305.09 to a Section 1983 claim of violation of right to counsel); *Crawford v. Zeitler,* 326 F.2d 119 (CA6 1964) (stating that while one year period applied to malicious prosecution and false arrest, four year period of Oh. Rev. Code Section 2305.09 would apply to all other Section 1983 actions); *Mason v. Owens-Illinois, Inc.,* 517 F.2d 520 (CA6 1975); (applying Oh. Rev. Code Section 2305.07, a six year period, to Section 1983 actions); *Austin v. Brammer,* 555 F.2d 142 (CA6 1977) (applying one year period of Oh. Rev. Code Section 2305.11 to Section 1983 action for false arrest and malicious prosecution); *Kilgore v. City of Mansfield,* 679 F.2d 632 (CA6 1982) (applying one year period of Oh. Rev. Code Section 2305.11 to Section 1983 action for false arrest and malicious prosecution).

12 See, for example, *Jackson v. City of Bloomfield,* 731 F.2d 652 (CA10 1984) (expressly declining to apply *Wilson* retroactively where prior pecedent established a longer limitations period upon which plaintiffs may have relied); *Hamilton v. City of Overland Park, supra,* (retroactively applied *Wilson,* court of appeals decision to extend the limitations period and grant plaintiff his day in court); *Mismash v. Murray City,*

(Continued on following page)

fully employed the *Chevron* test before applying the new statute of limitations retroactively, and no appeals court other than the Sixth Circuit has relied upon *DelCostello* as the controlling opinion.[13]

(Continued from previous page)

supra, (retroactively extended limitations period to permit plaintiff his day in court); *McKay v. Hammock, supra,* (followed *Wilson,* court of appeals decision, in applying residual statute of limitations, extending the period and providing plaintiff his day in court); *Gibson v. United States,* 781 F.2d 1334 (CA9 1986), ("[w]hen retroactive application would shorten the statute of limitations, *Wilson* merits only prospective effect." *Gibson* at 1339); *Rivera v. Green,* 775 F.2d 1381 (CA9 1985), pet. for cert. pending, (expressly stating that *Wilson* should be applied retroactively to lengthen the statute of limitations time period but should not be applied retroactively to shorten the period); *Jones v. Preuit & Mauldin,* 763 F.2d 1250 (CA11 1985) (retroactively applied *Wilson* to extend limitations period and grant plaintiff his day in court); *Winston v. Saunders,* 610 F. Supp. 176 (1985) (*Wilson* should not be applied retroactively to deny plaintiff access to court); *DeNardo v. Murphy,* 761 F.2d 1345 (CA9 1986) (two year statute of limitations period applied whether or not *Wilson* was applied retroactively; there were no prior published opinions setting a limitations period upon which plaintiffs could have relied).

[13] *Smith v. City of Pittsburgh,* 764 F.2d 188 (CA3 1985) *cert. denied,* — U.S. —, 106 S. Ct. 349 (1985). (The Third Circuit pointed out that there were no prior Section 1983 decisions in the circuit applying a statute of limitations longer than two years; therefore, because the plaintiff could not have relied upon a longer period, the two year time limit retroactively applied.) See also, *Fitzgerald v. Larson,* 769 F.2d 160 (CA3 1985); *Wycoff v. Menke,* 773 F.2d 983 (CA8 1985) (the Eighth Circuit pointed out that previous decisions in that circuit should have placed Wycoff on notice that a two-year limitations period, the same as that finally adopted and applied retroactively in his case, might be applicable); *Gates v. Spinks,* 771 F.2d 916 (CA5 1985), cert. denied, — U.S. —, 54 L.W. 3598 (1986) (the court declined a residual, catch-all limitations period which encompassed actions based on theories other than tort and chose to apply the only state limitations period expressly applicable to personal injury actions).

C. The court below failed to take into consideration the fact that petitioner was never permitted to establish that her claims were within the statute of limitations by showing that they are continuing in nature.

1. In *Corbitt v. Anderson*, 778 F.2d 1471 (CA10 1985) a psychologist brought a Section 1983 action claiming the defendant was on a campaign to destroy plaintiff's professional standing. While some of the alleged action occurred outside the limitations period, the Tenth Circuit held that where the defendant's actions continued within the limitations period, the plaintiff's claims were not barred.

2. In *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984), it was held that "[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases."[14]

Petitioner Mulligan continues to suffer deprivation of her tenure rights as well as her liberty interests, thus bringing this action within the statute of limitations, whatever its length. A statute of limitations does not accrue on a continuing wrong until that wrong has ended. *Taylor v. Meirick*, 712 F.2d 112 (CA7 1983).[15]

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[14] *Id.* at 821, quoting *Donaldson v. O'Connor*, 493 F.2d 507 (CA5 1974), vacated on other grounds, 422 U.S. 563 (1975).

[15] See also, *Railing v. UMW*, 429 F.2d 780, 783 (CA4 1970) (federal cause of action for alleged destruction of business accrues on last date of continuing illegal conduct for purposes of applicable state statute of limitations); *Baxter v. Curtis*, 201 F. Supp. 100 (N.D. Oh. 1962).

II. THE DECISION BELOW RAISES COMPELLING QUESTIONS CONCERNING TENURE AND ACADEMIC FREEDOM RIGHTS OF STATE UNIVERSITY FACULTY

Petitioner, a tenured faculty member at OSU, has been subjected to and continues to suffer restriction and denial of her tenure rights. Tenure rights of a teacher may not be arbitrarily abridged, diminished, or deleted. See, *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Moreover, liberty interests are often fundamentally entwined with property rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). The restrictions on petitioner's tenure rights are an infringement on her rights to academic freedom and stigmatize petitioner in her professional pursuits.[16]

Prior to receiving tenure, petitioner was in a tenure track position, accruing rights to tenure. During that period of time respondents attempted to change the type of tenure petitioner was accruing. This Court has previously indicated that where an employee has a tenure track position, it is sufficient to establish a property interest in continued employment. *Vail v. Board of Education*, 706 F.2d 1435 (CA7 1983), *aff'd. by equally divided court*, — U.S. —, 104 S. Ct. 2144 (1984).

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[16] The Sixth Circuit has recognized that constraints in careers or occupations may give rise to infringement of liberty or property interests, *Wilkerson v. Johnson*, 699 F.2d 325 (CA6 1983), as well as finding that inaccurate and stigmatizing personnel files, as petitioner has alleged in this case, infringe on an employee's liberty interests. *Yashon v. Gregory*, 737 F.2d 547 (CA6 1984); *Kendall v. Board of Education*, 627 F.2d 1, 5 (CA6 1980).

Petitioner was never given reasonable and adequate notice of the intended change in her tenure rights, either prior to or after attaining tenure, a situation contrary to this Court's holding in *Cleveland Board of Education v. Loudermill*, 470 U.S. —, 105 S. Ct. 1487 (1985) and *Memphis Light v. Craft*, 436 U.S. 1 (1977).

Moreover, while the proposed change in tenure rights was not published in the *By-Laws*, or the *Rules*, assurances that tenure will not be used to restrict petitioner's rights appear in at least three places in the *Rules* which are themselves encompassed in the Ohio Administrative Code ("Oh. Adm. Code")[17] There exists, at the very least, a factual dispute as to the conflict between the proposed change in tenure and the actual provisions of *Rules* and *By-Laws* of the University.

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[17] Three places in the *Rules* where full tenure rights are guaranteed petitioner are as follows: Oh. Adm. Code Section 3335-3-35 Sec. B(10) (App. A-35) charges department chairmen with seeing that all faculty, regardless of their assigned locations, are offered departmental privileges and responsibilities appropriate to their rank; Oh. Adm. Code Section 3335-5-01 (App. A-36) endorses full academic freedom for all faculty as essential; and Oh. Adm. Code Section 3335-5-03 (App. A-37) states that the protections of tenure and academic freedom extend to all levels of responsibility within the University and are not restricted to activities identified with a particular instructional program. In its written opinion in *Mulligan v. Hazard, supra*, at 344, note 8, the court erroneously states that the change in tenure had been published in the *Rules;* neither respondents nor petitioner have claimed this to be the case. The only place in which any printed reference to campus specific tenure ever appeared has been a surreptitious reference to same in a booklet known as the "Faculty Handbook," a "welcome wagon" publication produced by the OSU office of public relations and containing information about radio and television stations, temperature ranges, etc., in Columbus, Ohio, and referring persons interested in knowing the OSU bylaws and rules to the *By-Laws* and *Rules*.

The importance of academic freedom for university faculty has been emphasized by this Court as recently as *Regents of the University of Michigan v. Ewing*, — U.S. —, 54 L.W. 4055 (1985). In *Ewing*, this Court reaffirmed its commitment in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) which states "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, in turn, quoted from this Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), emphasizing the essential need for teachers to be free to study and to pursue inquiry.[18] In the instant case tenure has been used to physically restrict a faculty member and to place limits on her academic freedom.

III. THE DECISION BELOW CHANGES SUBSTANTIALLY THE CONCEPT OF LIBERTY INTEREST INFRINGEMENTS AND IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

The court below admitted that some of the derogatory material in petitioner's personnel file was within the one

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[18] The *Sweezy* court stated that "[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

year limitations period, but held that due to the accumulated earlier material, there was no liberty interest infringement. (App. A-1-10.) The court made that determination without ascertaining when petitioner knew or should have known of the existence of the material in her file. Such a holding conflicts with this Court's decision in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).[19]

Moreover, the lower court's holding that a personnel file can be so falsely derogatory that adding additional false and derogatory matter does not constitute a violation of liberty interests changes substantially this Court's interpretation of liberty interests in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop v. Wood*, 426 U.S. 341 (1976).[20] The likelihood that the petitioner's derogatory personnel file will be provided to any prospective employers seriously implicates petitioner's liberty interests. *Yashon v. Gregory*, 737 F.2d 547 (CA6 1984); *Kendall v. Board of Education*, 627 F.2d 1, 5 (CA6 1980).

The lower court's holding that cumulative material in petitioner's personnel file does not constitute a violation

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19 The equitable doctrine that where a plaintiff remains in ignorance of a wrong without any fault or want of diligence on his part, the statute of limitations does not begin to run until the wrongdoing is discovered, is read into every federal statute of limitations. *Holmberg, supra*.

20 In *Bishop, supra*, substantial emphasis was placed upon the fact that because all communications leading up to the litigation had been oral and in private, they did not impair employee's protected liberty interests. The decision in *Roth, supra*, citing several previous decisions of this Court, makes clear that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Roth*, at 573.

of petitioner's liberty interests is also contrary to the rulings of other federal courts of appeals concerning continuing constitutional tort violations.[21]

CONCLUSION

For the reasons stated above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK G. CLOPPERT, JR.
(Counsel of Record)
SUSAN TRUITT
CLOPPERT, PORTMAN, SAUTER,
LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 461-4455

Attorneys for Petitioner
Linda Mulligan

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21 See discussion in text, Section II C, *supra;* notes 14-15 and accompanying text.

85-1641

No. .....

Supreme Court, U.S.
FILED
APR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

LINDA MULLIGAN,

Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHRYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK G. CLOPPERT, JR.
(*Counsel of Record*)
SUSAN TRUITT
CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
(614) 461-4455

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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[1]Page numbers in this column refer to pages in this appendix.

[2]Page numbers in this column refer to pages in the original appendix, as cited in the Petition. These page numbers are inserted in the text of this appendix in bold print.

The Petition for Writ of Certiorari, which was filed under separate cover, refers to pages in the following Appendix. Those page references refer to the original Appendix copy which was reproduced, submitted and rejected because of incorrect type size. The Appendix page numbers will consequently change because they are now being printed. To make the Petition's reference to the Appendix accurate, the page numbers of the original reproduced Appendix will be noted as A-1, A-2, etc., in bold type.

(A-1) No. 84-3555

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDA MULLIGAN, *Plaintiff-Appellant,*	)	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.
v.	)	
FRANCIS HAZARD, et al., *Defendants-Appellees.*	)	

Decided and Filed November 26, 1985

Before CONTIE and MILBURN, Circuit Judges, and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge. Plaintiff-appellant Linda Mulligan appeals from a summary judgment granted in favor of defendants-appellees, Ohio State University Board of Trustees and several of the University's administrators. Mulligan brought her action in the district court, pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that defendants unconstitutionally restricted her tenure rights as a faculty member of the University, in violation of the Fourteenth Amendment's due process clause as well as the First and Fifth Amendments, by amending the University's tenure policy in 1975 to provide for campus-specific tenure in place of the then prevailing policy of according tenure on a university-wide basis. For the reasons hereinafter stated, we **(A-2)** conclude that Mulligan's action is barred by the statute of limitations and we, therefore, affirm the district court's grant of summary judgment.

I.

Mulligan began her employment with Ohio State University in 1973 when she was hired as a visiting assistant professor with assignment to the branch campus at Marion. At the time of her hiring, Mulligan signed a Notice of Appointment (NOA) which provided the terms of her employment. Besides detailing her appointment as a visiting professor at Marion, the NOA stated that "the By-Laws of the Board of Trustees . . . . the Rules for the University Faculty and . . . the Official Actions of the Board of Trustees are expressly incorporated herein. . . ." The Rules of the University Faculty provided, at this time, that an appointment as a professor did not contain any commitment by the Trustees that the appointee would

be given tenure or that he would be reappointed at the conclusion of the term. In his letter offering Mulligan employment at Marion, Dr. Edward McDonagh, the chairman of the University's sociology department, elaborated on the University's tenure policy. He indicated that tenure was generally granted when the faculty member was reappointed for his or her eighth year but that it was sometimes granted earlier if the faculty member had already received a promotion to the position of associate professor. Dr. McDonagh did not promise Mulligan, in his letter, that she would receive tenure or reappointment.

At the beginning of the 1973 fall semester, Mulligan was offered and accepted an appointment as a regular non-visiting assistant professor. Again, the NOA which she signed stated that she would be assigned to the Marion campus and that the relevant by-laws and university rules were incorporated by reference. This appointment was renewed in each of the subsequent years and Mulligan accepted her reappointments by signing further NOAs. At all times, Mulligan was assigned to the Marion campus.

(A-3) At a meeting of the Board of Trustees, on September 5, 1975, a resolution was passed to amend the rules regarding tenure. Previously, a tenured faculty member held that status throughout the university system, *i.e.*, at the main campus in Columbus and at the various regional campuses. The September 5th resolution, which was subsequently incorporated into the University Faculty Handbook, declared that, from that date forth, faculty members who received tenure would only hold tenure at the particular campus where they rendered their primary service. On February 1, 1980, the Board of Trustees passed a resolution stating that those faculty members who rendered

their primary service at the regional campuses would be designated as members of a "regional campus faculty."

Mulligan continued to teach at the Marion campus after the 1975 tenure change. She signed a new NOA each year from 1975 through at least 1982.[1] Each of these NOAS contained a provision which made her employment subject "to the rules and regulations and personnel policies of the Board of Trustees." In 1979, Mulligan was awarded tenure and given a promotion to the position of associate professor.

Mulligan requested a transfer to the Columbus campus in 1980. Her request was denied. She then wrote several letters to various University administrators complaining about the alleged "second class citizenship" of the regional campus faculty and their underrepesentation on the various university faculty committees. Defendant Kent Schwirian, then chairman of the sociology department, wrote back to Mulligan denying her charges. In this letter, Schwirian criticized Mulligan for making accusations about him to the Provost instead of confronting him directly. Defendant Provost Ann Reynolds also wrote to Mulligan and criticized her for not first seeking to resolve her grievances within her department prior to contacting the Provost's **(A-4)** office. Both Schwirian's and Reynolds' letters were circulated among several of the University's administrators. After receiving a complaint from one of Mulligan's students about her action in changing the scheduled meeting times of her classes, defendant Dean Francis

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[1]Mulligan is presently a member of the Marion faculty. While the record only contains the NOAs which she signed through 1982, presumably she continued to sign NOAs or similar contractual agreements after 1982 as well.

Hazard wrote to Mulligan, on April 8, 1983, and advised her that her action violated university rules. A copy of Hazard's letter was placed in Mulligan's personnel file.

Mulligan filed this present action with the district court in October 1983. In her complaint, brought pursuant to 42 U.S.C. §§ 1983 and 1985. Mulligan alleged that her Fourteenth Amendment due process rights had been abridged by the defendants' actions. Specifically, Mulligan contended that she had been assured by the chairman of the sociology department, when she was initially hired in 1973, that her rights and privileges as a faculty member in the sociology department at the Marion campus would be essentially the same as those for a faculty member teaching at the Columbus campus. She further alleged that the Board of Trustees failed to give the university faculty notice or an opportunity for a hearing prior to its adoption of the 1975 change in the tenure rules. The tenure change, Mulligan contended, substantially changed her contract and diminished the value of her expected tenure. Mulligan added pendant state law claims for breach of contract and tortious interference with Mulligan's contract rights. In her prayer for relief, she sought an injunction as well as compensatory and punitive damages. Specifically, Mulligan requested an order which would require the defendants to grant her university-wide tenure and to integrate her in all aspects of the operation and academic life of the University's sociology department.

The defendants motioned the district court for summary judgment. On May 15, 1984, the court granted their motion. In his accompanying memorandum of law, District Judge Duncan ruled that Mulligan did not have a property interest in the retention of the pre-1975 tenure

system. Judge Duncan based his holding on the fact that the Board of Trustees had changed **(A-5)** the tenure rule in 1975 while Mulligan did not receive tenure until 1979. Judge Duncan further held that the institution of campus-specific tenure did not deny Mulligan a protected liberty interest. Thus finding no merit to Mulligan's federal claims. Judge Duncan declined to entertain her pendent state claims.

Mulligan's motion for reconsideration was rejected by an order of Judge Duncan issued June 14, 1984. On July 12, 1984, Mulligan filed her appeal from both orders to this court.

II.

As an initial matter, we must determine whether Mulligan's action is barred by the statute of limitations.[2] Congress did not establish a statute of limitations for actions brought under 42 U.S.C. §§ 1983 and/or 1985. The courts, consistent with the mandate of 42 U.S.C. § 1988,[3] have

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[2]Though not discussed by the district court in its memorandum granting defendants' motion for summary judgment, the issue of the statute of limitations was raised by defendants in their brief in support of their motion. Therefore, the issue is properly before this court.

[3]42 U.S.C. § 1988 states, in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of [the civil rights statutes] . . . shall be exercised and enforced in conformity with the laws of the United States . . . ; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

turned to the analogous state statutes of limitations. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-4 (1980). The Supreme Court has recently held that, as a matter of law, § 1983 actions should be characterized as personal injury actions for the purpose of determining the applicable statute of limitations. *Wilson v. Garcia*, — U.S. — 105 S.Ct. 1938 (1985). In so ruling, the Court rejected the use **(A-6)** of other arguably analogous statutes of limitations, such as those for breach of contract actions, tort claims for damages to property, tortious acts committed by public officials or the states' catchall period of limitations. *Id.* at 1948-9.

Depending upon the nature of the personal injury, there are two different Ohio statutes of limitations which could apply to the action. First, an action to recover for bodily injury must be brought within two years after the cause arose. Ohio Rev. Code § 2305.10. Second, an action for libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice will be barred if not brought within one year after the cause accrued. Ohio Rev. Code § 2305.11.[4] Before discussing which of these

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[4]Arguably, Ohio Rev. Code § 2305.09(D) (action for injury to the rights of the plaintiff not arising on contract nor enumerated in §§ 2305.10 to 2305.12, inclusive, §§ 2305.14 and 1304.29) is also applicable to personal injury actions. However, § 2305.09(D) is more in the nature of a catch-all statute of limitations, as compared to §§ 2305.10 and 2305.11, and is, therefore, inapplicable to federal civil rights actions brought under 42 U.S.C. §§ 1983 and 1985. *Wilson v. Garcia*, — U.S. —, 105 S.Ct. at 1948.

Recently, the Ohio legislature amended § 2305.11 and removed assault and battery actions from its scope. The legislature concurrently enacted a new statute, Ohio Rev. Code

(Continued on following page)

statutes is applicable, however, we must first determine whether the holding of *Wilson v. Garcia* should be applied retroactively to the instant case.

The Supreme Court did not address the issue of whether the holding of *Wilson v Garcia* should be applied retroactively to cases already filed but not decided prior to *Wilson*. However, the Court itself, applied its holding retroactively in the *Wilson* case by upholding the U.S. Court of Appeals' decision to apply New Mexico's statute of limitations for personal injury actions in lieu of another statute which the New Mexico Supreme Court **(A-7)** had earlier held was applicable to a factually similar § 1983 action and which would have barred the plaintiff from prosecuting the lawsuit.[5] *Wilson* is similar to the Supreme Court's recent decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), where the Court's holding on the applicability of a statute of limitations was applied retroactively to the case at hand even though the Court did not expressly discuss whether its decision should, in fact, be given retroactive effect. By so doing, the Court in *DelCostello* was impliedly holding that

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(Continued from previous page)

§ 2305.111, which provides for a one year limitations period for assault and battery actions. Since § 2305.11 had previously provided a one year limitations period for such actions, the amendment and enactment of new section 2305.111 effects no change in the limitations period. For purposes of our discussion, we will refer to § 2305.11, as it read prior to the amendment, since it was in effect at the time the lawsuit was filed.

[5]In *DeVargas v. New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982), the New Mexico Supreme Court ruled that the plaintiff's § 1983 action was barred by the two year statute of limitations contained in § 41-4-15(A) of the New Mexico Tort Claims Act.

the statute of limitations should be applied retroactively. *Smith v. General Motors Corp.*, 747 F.2d 372, 375 (6th Cir. 1984) (*en banc*).[6] *Welyczco v. U.S. Air Inc.*, 733 F.2d 239 (2d. Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 512 (1984). *See also Gray v. Amalgamated Meat Cutters Local 540*, 736 F.2d 1055 (5th Cir. 1984). *Cf. Zemonick v. Consolidation Coal Co.*, 762 F.2d 381, 384-5 (4th Cir. 1985) (refused to give retroactive effect to *DelCostello*). Similarly, *Wilson* implicitly mandates that its holding be applied retroactively.

As noted above, Ohio has two statutes of limitations which relate to personal injury actions. Ohio Rev. Code §§ 2305.10 and 2305.11. In our opinion, § 2305.11 is the more appropriate of the two statutes of limitations for actions arising under the civil rights statutes. As the Supreme Court noted in *Wilson*, Congress enacted the Civil Rights Act of 1871 in order to com- **(A-8)** bat the violence that was being perpetuated by the Ku Klux Klan and other organizations against the newly emancipated slaves.[7] The concern of Congress, thus, was with perpe-

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[6]As Judge Martin explained:

> If the Supreme Court had not intended for *DelCostello* to apply retroatively, the Court easily could have reserved the issue or could have applied the statute of limitations prospectively, as it did in *Chevron* [*Oil Co. v. Huson*, 404 U.S. 97 (1971)]. By applying the statute of limitations to extinguish the claim in the case before the Court, we feel the Supreme Court demonstrated its intent to apply *Del Costello* retroactively.

Smith v. General Motors Corp., 747 F.2d 372, 375 (6th Cir. 1984) (*en banc*).

[7]In discussing the historical impetus for the enactment of the civil rights statutes, the Court stated:

(Continued on following page)

tuators of intentional tortious conduct. While both §§ 2305.10 and 2305.11 theoretically encompass intentional tort actions. § 2305.11, which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted the civil rights statutes. Accordingly, we hold that the one year limitations period contained in § 2305.11 governs Mulligan's actions.

Mulligan's cause of action accrued in 1975 when the Board of Trustees changed the University's tenure policy. Since Mulligan's action was brought in 1983, which is eight years after the Board's action, it is time barred by the statute. Even if we were to accept Mulligan's contention that the cause accrued in 1980, when she allegedly first became aware of the tenure change,[8] her action is still, none-

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(Continued from previous page)

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying citizens their civil and political rights [citation omitted]. The debates on the Act chronicle the alarming insecurity of life, liberty and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents. [quotation omitted] By providing a remedy for the violation of constitutional rights. Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.

Wilson v. Garcia, — U.S. —, 105 S.Ct. 1938, 1947 (1985).

[8]This contention is untenable. The Board's 1975 action was published in the Rules of the University Faculty that very same year and has continued in effect since then. The NOAs, which Mulligan signed every year from 1975 through at least 1982, specifically incorporated these rules. Therefore, Mulligan had notice of the rule since its inception. Further, Mulligan has alleged no specific misstatement or falsehood by any university official which could have caused her to believe that the 1975 tenure change was not in effect.

theless, time barred. Thus, regardless of the merits of her claim, she is barred from bringing it at this late date.

(A-9) The only portion of this action which is not time barred is Mulligan's claim relating to defendant Hazard's April 8, 1983 letter. Mulligan contends that this letter, which was placed in her personnel file, violated a protected liberty, interest by "stigmatizing" her in any future job searches. She argues that since her file would likely be given to her prospective employers she would be harmed by the allegedly inaccurate accusations contained in Hazard's letter.

A determination regarding whether the April 8, 1983 letter deprived Mulligan of her alleged liberty interest in an accurate personnel file requires consideration of the letter in the context of her entire file, including the letters of August 24, 1981 and October 23, 1980 which Mulligan is barred from challenging. The October 23, 1980 memorandum from Assistant Dean C. Leslie Carpenter to Dean Francis Hazard indicated that Mulligan had unilaterally cancelled her scheduled classes for Sociology 101. Carpenter indicated that the change was unfair to the students and that "this matter only creates further doubt about her attitude toward and commitment to her teaching duties in Marion." Hazard indicated agreement. The August 24, 1981 letter to Mulligan from Kent Schwirian chairman of the Sociology Department, indicated that Mulligan violated the "normal channels of communication" in complaining about several matters. The letter of April 8, 1983 to Mulligan from Hazard charged Mulligan with failure to comply with University policy with respect to the scheduling of classes and accused her of persistent violation of the policy.

In light of material already present in Mulligan's file, especially the October 1980 memorandum, it is clear that the letter of April 8, 1983 is merely cumulative, and, regardless of whether Mulligan could establish a constitutionally protected liberty interest in the accuracy of her file,[9] the April 1983 letter alone effects no deprivation of that interest. *Lake Michigan Col-* **(A-10)** *lege Federation of Teachers v. Lake Michigan Community College,* 518 F.2d 1091, 1096-97 (6th Cir. 1975), *cert. denied,* 427 U.S. 904 (1976).

Accordingly, the judgment of the district court is AFFIRMED.

(A-11) JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

District
Southern District of Ohio Eastern Division

Docket Number
C-2-83-1984

Name of Judge or Magistrate

Judge Robert M. Duncan

Case Title

Linda Mulligan

V.

Francis E. Hazard, et al.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding.

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[9]*Kendall v. Board of Education of Memphis,* 627 F.2d 1, 5 (6th Cir. 1980).

The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

defendant's motion for Summary Judgment is GRANTED, JUDGMENT is entered for the defendants against the plaintiff.

Clerk

Kenneth J. Murphy

(By) Deputy Clerk

/s/ Bev Robinson

Date

May 15, 1984

(A-12) IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-83-1984

Linda Mulligan,

Plaintiff

v.

Francis E. Hazard, et al.,

Defendants

MEMORANDUM AND ORDER

This action is brought pursuant to 42 U.S.C. § 1983 and § 1985 to redress alleged violations of plaintiff's Fourteenth Amendment due process rights. Plaintiff also seeks

to recover on pendent state claims for breach of contract and tortious interference with a contractual relationship. The defendants have moved for summary judgment. This matter is presently before the Court on that motion.

I

Plaintiff was first employed by Ohio State University in October 1973 as an assistant professor of sociology. Plaintiff's contract of employment with the University consists of a series of notices of appointment for each year of employment. (See Defendants' Exhibits A-P.) The Rules and Regulations of the University and the Faculty Handbook were incorporated into and made part of plaintiff's employment contract.

(A-13) At the time of plaintiff's original appointment, and continuing to the present time, plaintiff was assigned to teach at the Marion campus. In 1979, plaintiff became an associate professor of sociology with tenure.

Plaintiff's claims of a denial of constitutional and contractual rights revolve around the defendants' decision in 1975 to revise the Faculty Handbook. More specifically, the Handbook, which is incorporated into every faculty member's employment contract, was revised in 1975 so as to make tenure campus-specific. In other words, after 1975 faculty members were entitled to receive tenure only at the campus at which they taught and were assigned. It is undisputed that in 1975 plaintiff signed a revised notice of appointment which incorporated the revised Faculty Handbook provision making tenure campus-specific. It is further undisputed that plaintiff did not receive tenure

until 1979 sometime after the revised Handbook was made part of her employment contract.

The defendants in this case are all employed in some form or another by Ohio State University. It is unclear what, if any, role each of the defendants played in revising the Faculty Handbook and in abiding by the terms of that revised Handbook. Defendant Schwirian is the Chairman of the Department of Sociology; defendant Hazard is the Dean of the Marion campus; defendant Reynolds and defendant Haenicke are the former and present Provost; defendant Schoen and defendant Jackson are affiliated with the Provost's Office; defendant Brown is the Dean of the College of Social and Behavioral Sciences; defendant Mount **(A-14)** is Vice President of Regional Campuses; and defendant Jacob is Chairman of The Ohio State University Board of Trustees.

Plaintiff sets forth a number of claims in her complaint, the most important of which is a denial of property and liberty without due process of law. The plaintiff bases her due process claim on the defendants' unilateral act of revising the Faculty Handbook in 1975. Plaintiff further alleges that the revision of the Faculty Handbook deprived her of tenure and contract rights under state law and amounts to a tortious interference with her contract rights. The Court hereinafter considers each of the plaintiff's claims and the alleged basis for dismissal of those claims.

II

As defendants correctly note, in order for plaintiff to recover in this case, it is first necessary for plaintiff to establish an interest or right deserving of protection under the Fourteenth Amendment.

The types of property interests protected by the Fourteenth Amendment are varied. In the context of the academic world, the Supreme Court has acknowledged that actions on the part of a university which give rise to an expectancy may result in finding a protected property interest. However, unilateral expectations which have no basis in statute, contract or a mutually explicit understanding are clearly not protected. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 **(A-15)** U.S. 593 (1972). *See also McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979).

While the plaintiff correctly notes that informal policies or understanding, even in the face of formal policies and rules, may give rise to an expectancy, it is clear that what is required is some conduct or assurance by a university official. *See Jago v. Van Curen*, 454 U.S. 14 (1981); *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Harris v. Arizona Board of Regents*, 528 F. Supp. 987 (D. Ariz. 1981).

In the present case, plaintiff argues that under the first contract she signed with the University in 1973 tenure was not campus-specific. Therefore, plaintiff contends that prior to making tenure campus-specific by virtue of a revision of the Faculty Handbook in 1975, plaintiff was entitled to notice and an opportunity to be heard. Apparently, plaintiff is asserting a property interest in tenure which is not limited to a specific campus. Or stated another way, plaintiff is alleging a property interest in continuing to be employed under precisely the same terms and conditions which were found in plaintiff's original 1973 one-year employment contract.

The Court finds no merit to plaintiff's contention that she had a property interest in not having tenure made campus-specific. The Court has carefully reviewed all of the relevant University rules and Faculty Handbooks. None of those documents contain any language which could reasonably be interpreted as allowing faculty members to receive University-wide tenure after **(A-16)** a certain period of time regardless of where they performed their teaching duties. Moreover, the absence of a provision until 1975 making tenure campus-specific cannot in and of itself be deemed to create an expectancy of University-wide tenure. Finally, plaintiff has pointed to no statements or actions of University personnel which could be viewed as creating a reasonable expectation that tenure, when and if received, would be University-wide.

Plaintiff also contends that the defendants' alteration of the Faculty Handbook in 1975 so as to make tenure campus-specific operated to deny plaintiff liberty to practice her profession without due process. The Court finds no merit to these allegations. *Paul v. Davis*, 424 U.S. 693 (1975) makes abundantly clear that damage to reputation, absent loss of career opportunity, does not amount to a deprivation of liberty. In order to state a claim for deprivation of liberty, therefore, the plaintiff must show both a "stigma" resulting from defendants' actions and a loss of employment opportunity. *See also Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980); *Weathers v. West Yuma County School District*, 530 F.2d 1335 (10th Cir. 1976).

It is not disputed that when plaintiff was awarded tenure in 1979, the 1975 Faculty Handbook making tenure

campus-specific was in effect. The plaintiff claims that failure to make her tenure University-wide stigmatized plaintiff. However, plaintiff fails to identify with any degree of specificity, the way in which her good name, reputation or integrity were damaged. Moreover, there is absolutely no evidence in the record of **(A-17)** plaintiff being foreclosed from any professional opportunities as a result of the defendants' actions.

Viewing all matters of record in a light most favorable to the plaintiff, the Court simply finds no facts from which a denial of constitutional rights could be inferred. Accordingly, defendants' motion for summary judgment is well taken and is GRANTED.

Having found that plaintiff has no liberty or property interest or right deserving of protection under the Fourteenth Amendment, the Court is not required to determine what process was due plaintiff. Moreover, having dismissed plaintiff's federal claims, the Court, in the exercise of its sound discretion, may refuse to entertain plaintiff's pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

III

In conclusion, the defendants' motion for summary judgment is well taken in all respects. The Clerk of Court is DIRECTED to enter JUDGMENT for the defendants and against the plaintiff.

So ORDERED.

/s/ Robert M. Duncan
Robert M. Duncan, Judge
United States District Court

(A-18) IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-83-1984

Linda W. Mulligan,

Plaintiff,

v.

Francis E. Hazard, et al.,

Defendants.

June 15, 1984

Kenneth Murphy, Clerk
(Filed June 14, 1984)

U.S. District Court, Southern Dist. Ohio
East Div., Columbus

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion for reconsideration of this Court's May 15, 1984 order granting defendants' motion for summary judgment. Plaintiff also requests oral argument. The Court has carefully reviewed all matters of record in this case and has reflected on the arguments made by counsel at a prior oral hearing. No additional arguments are needed for the Court to decide the matters which are pending.

The Court does not believe that plaintiff has presented any additional facts which would warrant this Court in reconsidering its prior order granting defendants' motion for summary judgment. The Court does not want to appear unsympathetic to plaintiff's concerns. Nonetheless, not every possible grievance against the State or its officers is capable of redress in federal court in a § 1983 action.

(A-19) In sum, the Court finds no basis for reconsidering its prior order of May 15, 1984. Plaintiff's motion for reconsideration is hereby DENIED.

So ORDERED.

/s/ Robert M. Duncan, Judge
United States District Court

(A-20) UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3555

LINDA MULLIGAN,

Plaintiff-Appellant,

v.

FRANCIS E. HAZARD, et al.,

Defendants-Appellees.

Before: CONTIE and MILBURN, Circuit Judges; and WEICK, Senior Circuit Judge.

JUDGMENT

(Filed November 26, 1985)
John P. Hehman, Clerk

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment

of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman, Clerk

Issued as Mandate: January 16, 1986 A True Copy.

COSTS: None

Filing fee .....$ Attest:

Printing .....$ /s/ Gary McCarthy

Deputy Clerk

Total.....$

(A-21) No. 84-3555

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDA MULLIGAN,

Plaintiff-Appellant,

v.

FRANCES E. HAZARD, ET AL.,

Defendants-Appellees.

ORDER

(Filed January 7, 1986)
John P. Hehman, Clerk

Before: CONTIE and MILBURN, Circuit Judges, and WEICK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
/s/ John P. Hehman, Clerk

(A-22) The Constitution Of The United States

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(A-23) 42 U.S.C. Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R. S. § 1979.)

(A-24) 42 U.S.C. Section 1985

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to

any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce the right of any person, or class of persons, to the equal protection of the laws;

(A-25)

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned

by such injury or deprivation, against any one or more of the conspirators.

(R. S. § 1980.)

(A-26) Ohio Revised Code

[CONTRACTS]

§ 2305.06 Contract in writing.

Except as provided in section 1302.96 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

HISTORY: GC § 11221; RS § 4980; S&C 948; 51 v 57, § 13:129 v 13 (176). Eff 7-1-62.

(A-27) Ohio Revised Code

§ 2305.07 Contract not in writing.

Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

HISTORY: GC § 11222; RS § 4981; S&C 948; 51 v 57, § 14; 129 v 13(176). Eff. 7-1-62.

(A-28) Ohio Revised Code

[TORTS]

§ 2305.09 Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

HISTORY: GC § 11224; RS § 4982; S&S 541; S&C 948; 51 v 57, § 15; 64 v 145; 81 v 210; 112 v 237; 129 v 13 (1977). Eff 7-1-62.

(A-29) Ohio Revised Code

§ 2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium

in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

HISTORY: GC § 11224-1; 112 v 237; 138 v H 716. Eff 6-12-80.

Ohio Revised Code
(as amended 5-31-84)

§ 2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occrus first.

HISTORY: 139 v S 406 (Eff 8-26-82); 140 v H 72. Eff 5-31-84.

(A-30) Ohio Revised Code

[LIBEL, ASSAULT, MALPRACTICE, ETC.]

§ 2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(A-31)

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corpora-

tion, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

HISTORY: GC § 11225; RS § 4983; S&C 949; 51 v 57, § 16; 91 v 299; 120 v 646; 122 v 374; 135 v H 989 (Eff 9-16-74); 136 v H 682 (Eff 7-28-75); 136 v H 1426. Eff 7-1-76.

(A-32) Ohio Revised Code
(as amended 9-26-84)

[LIBEL, ASSAULT, MALPRACTICE, ETC.]

§ 2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including an ac-

tion for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code shall be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means all persons licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person.

HISTORY: 139 v H 243 (Eff 3-15-82); 140 v S 183. Eff 9-26-84.

(A-33) Ohio Revised Code

[§ 2305.11.1] § 2305.111 [Actions for assault or battery.]

An action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

(A) The date on which the alleged assault or battery occurred;

(B) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(1) The date on which the plaintiff learns the identity of that person;

(2) The date on which, by the exercise of reasonable diligence, he should have learned the identity of that person.

HISTORY: 140 v S 183. Eff 9-26-84.

(A-34) Ohio Revised Code

§ 2305.14 For other relief.

An action for relief not provided for in sections 2305.04 to 2305.131 [2305.13.1], inclusive, and section

1304.29 of the Revised Code, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory.

HISTORY: GC § 11227; RS § 4985; S&C 949; 51 v 57. § 18; 129 v 13(177) (Eff 7-1-62); 130 v 648. Eff 9-10-63.

(A-35) Rules Of The University Faculty

3335-3-35 Chairpersons of departments, directors of schools.

* * *

(B) The duties of the chairperson of a department or the director of a school shall be as follows:

* * *

(10) To see that all faculty, regardless of their assigned location, are offered the departmental privileges and responsibilities appropriate to their rank; and in general to lead in maintaining a high level of morale.

(A-36) Rules Of The University Faculty

3335-5-01 Academic freedom and responsibility.

(A) The Ohio state university endorses full academic freedom as essential to attain the goal of the free search for truth and its free exposition. Academic

freedom and academic responsibility are twin guardians of the integrity of institutions of higher learning. This integrity is essential to the preservation of a free society and explains the willingness of society historically to accept the concept of academic freedom and, in addition, to protect it through the institution of academic tenure.

(B) The principal elements of academic freedom include:

(1) The freedom of the teacher to teach, conduct research and publish research findings;

(2) The freedom of the teacher to discuss in a classroom, in his own manner, any material that is relevant to the subject matter as defined in the course objectives;

(3) The freedom of the teacher to exercise his constitutional rights as a citizen without institutional censorship or discipline;

(4) The freedom to seek changes in academic and institutional policies through lawful and peaceful means.

(C) Academic freedom carries with its correlative academic responsibilities. The principle elements include:

(1) The responsibility of the teacher to meet his defined teaching, research and service obligations;

(2) The responsibility of the teacher to pursue excellence, intellectual honesty, and objectiv-

ity in teaching, in conducting research, and in publishing research findings;

(3) The responsibility of the teacher to encourge students and colleagues to engage in free discussion and inquiry;

(4) The responsibility of the teacher to evaluate student and colleague performance on a scholarly basis;

(5) The responsibility of the teacher to refrain from persistently introducing matters that have no bearing on the subject matter of the course;

(6) The responsibility of the teacher to work with appropriate individuals and bodies to provide optimal conditions conducive to the attainment of the free search for truth and its free exposition;

(7) The responsibility of the teacher to differentiate carefully his official activities as a teacher from his personal activities as a citizen, and to act accordingly. (B/T 9/14/65, B/T 5/2/75)

(A-37) Rules Of The University Faculty

3335-5-03 Election of faculty and staff; tenure.

The board of trustees shall annually appoint the president and all employees of the university not in the classified civil service, subject to the laws of the state of Ohio, and in the case of regular faculty, to the

rights and protection of tenure. Tenure is a commitment by the university and may be earned by all individuals with regular faculty status subject to a probationary period. Regular faculty status is defined in rule 3335-5-19 of the Administrative Code. The protections of tenure and academic freedom extend to all levels of faculty responsibility within the university in accord with rule 3335-5-01 of the Administrative Code and are not restricted to activities identified with specific instructional, research or public service programs. Tenure is lost by formal resignation, by retirement, or may be terminated by reason of proved incompetence or grave misconduct in accordance with rule 3335-5-04 of the Administrative Code, for causes set forth in rule 3335-5-02 of the Administrative Code, or under the conditions of bona fide financial exigency, as specified in rule 3335-5-021 of the Administrative Code.

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

CASE NO. 85—1641

In The Supreme Court of the United States

OCTOBER TERM, 1985

LINDA MULLIGAN,

Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHERYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

COUNSEL OF RECORD FOR RESPONDENTS

35 pp

QUESTIONS PRESENTED

1. Whether Ohio's personal injury statute of limitations for intentional torts should be applied to actions arising under 42 U.S.C. § 1983.

2. Whether Ohio's personal injury statute of limitations for intentional torts should be retroactively applied to Petitioner's claims, where retroactive application leads to the same result that would have occurred under previously existing statutes of limitations.

3. Whether Petitioner had a liberty interest protected by the due process clause of the Fourteenth Amendment where she was not terminated from employment and no dissemination was made to the public of allegedly defamatory documents in her personnel file.

4. Whether Petitioner had a property interest protected by the due process clause of the Fourteenth Amendment where she had no legitimate claim of entitlement to university wide tenure.

5. Whether due process would have been provided for Petitioner's property and liberty claims through the Ohio Court of Claims.

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STATUTES AND REGULATIONS INVOLVED

Section 1.51, Ohio Revised Code (R. App. A-3).

Section 2743.02, Ohio Revised Code (R. App. A-3).

Section 2743.03, Ohio Revised Code (R. App. A-5).

Section 2743.16, Ohio Revised Code (R. App. A-7).

Section 4112.051(A), Ohio Revised Code (R. App. A-7).

Faculty Handbook, § 1.3.1 (R. App. A-8).

Faculty Handbook, § 1.4 (R. App. A-8).

Resolution of the OSU Board of Trustees, Sept. 5, 1975, § C.4 (R. App. A-10).

Rules of the University Faculty, 21.03 (R. App. A-10).

STATEMENT OF THE CASE
Proceedings Below

In a complaint filed on October 20, 1983 in the United States District Court for the Southern District of Ohio, Eastern Division, Petitioner Linda Mulligan made the following allegations. She holds a Doctor of Philosophy Degree in Sociology. In 1973 she was hired as an Assistant Professor in the Department of Sociology of the Ohio State University (OSU). Since she was hired, her teaching assignments have been at OSU's regional campus in Marion, Ohio, where Mulligan has been a member of the faculty. In 1979, Mulligan was promoted to Associate Professor with tenure, a position that continues to the present time. As a member of the Marion regional campus faculty and the Department of Sociology faculty, she is subject to the same regulations and evaluation procedures as are faculty members on the Columbus campus.

Named as Defendants in the complaint were Francis Hazard, Kent Schwirian, S. Earl Brown, John T. Mount, W. Ann Reynolds, Kathryn T. Schoen, Dorothy W. Jackson, Diether H. Haenicke and John D. Jacob, all current or former OSU officials, and the OSU Board of Trustees.

Mulligan alleged four separate causes of action in the complaint. The first two causes of action were brought under 42 U.S.C. §§ 1983 and 1985. In the first Mulligan alleged that she was denied due process of law when in 1975, OSU inserted a provision in its Faculty Handbook that stated that tenure was campus specific; that is, tenure would be obtained only at the compus where a professor did his or her teaching. The second cause of action alleged that Defendant Schwirian wrote a letter to Mulligan in which he made false statements, thereby denying Mulligan her liberty to practice her profession without due process of law. The third cause of action was a pendent state law claim, alleging that the inclusion of the provision in the Faculty Handbook that tenure was campus specific breached Mulligan's contract with OSU. The fourth cause of action alleged in a non-specific manner that Defendants had tortiously interferred with Mulligan's contract with OSU.

On May 15, 1984, the Court entered summary judgment for Defendants, holding that Mulligan did not have a property interest in university wide tenure to support a claim of denial of property without due process, the alteration of the Faculty Handbook did not deny Mulligan a protected liberty interest, and the Court would not exercise pendent jurisdiction over Mulligan's state law claims.[1] (App. 13).

On appeal, the United states Court of Appeals for the Sixth Circuit affirmed the judgment, holding that Mulligan's property and all of her liberty claims, with one exception, were barred by the applicable statute of limitations. The Court also found that one allegedly defamatory letter not barred by the statute of limitations had not denied Mulligan a protected liberty interest. *Mulligan v. Hazard,* 777 F. 2d 340 (6th Cir. 1985).

Statement Of The Facts

The facts in the record relevant to the issues on appeal are as follows.

Mulligan has been employed continuously by OSU since October 1, 1973, with her teaching duties being performed exclusively at the Marion regional campus. The previous year, she taught at the Marion regional campus on a part-time basis.

For each of the years that she has been employed at OSU, Mulligan has signed a contractual form entitled "notice of appointment" (NOA). Each of these NOA forms is signed by the Secretary of the OSU Board of Trustees and Mulligan. Each of the forms sets forth the basic contractual relationship between OSU and Mulligan, including salary, position, department, and period of time for which the services are to be performed. Each form is for a period of not more than three school quarters. For each year at OSU, Mulligan signed a new NOA.

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[1] Respondents also argued in their motion for summary judgment that the complaint was barred by the applicable statute of limitations and that process was available for Mulligan's due process claims in the Ohio Court of Claims.

For the 1973-74 and 1974-75 school years, the NOA's contained the following provision:

> The pertinent provisions of the Revised Code of Ohio, of the By-Laws of the Board of Trustees, of the Rules for the University Faculty and of the Official Actions of the Board of Trustees are expressly incorporated herein and this agreement is conditioned upon full compliance therewith.

Starting with the 1975-76 school year, a slightly different NOA henceforth included this language: "Your employment pursuant to this appointment is subject. . .to compliance with the laws of Ohio, the rules and regulations of the Board of Trustees, and the general personnel policies of the University."

Among the provisions of the Rules of the University Faculty incorporated by reference into the NOA's is the following reference to the NOA form in Rule 21.03. "Neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment." (R. App. A-10)[2]

Also incorporated by reference into the NOA's is the Faculty Handbook, which sets forth many of the general personnel policies of OSU.[3] Section 1.4 of the Handbook states in part that the "University does not assume any continuing obligation to renew the appointment of a non-tenured faculty member." (R. App. A-8).

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[2] References to Petitioner's appendix are to "App." References to the appendix attached to Respondents' brief are to "R. App.".

[3] Contrary to the derisive reference made at page 16, n. 17 of the petition for writ of certiorari that the Faculty Handbook is a "welcome wagon publication produced by the OSU office of public relations," the Handbook is published by the OSU Office of Academic Affairs and contains information regarding the university-faculty relationship, instructional standards, research facilities, academic organization and university services.

On September 5, 1975, the OSU Board of Trustees passed a resolution ratifying, approving and adopting the policies and procedures contained in a booklet entitled *Faculty Appointments, Promotions and Tenure.* Section C.4 of the booklet limits tenure to the campus where the primary service is rendered.

> The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). *Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.* (Emphasis added). (R. App. A-10).

This provision was also included in the 1975 Faculty Handbook as § 1.3.1. (R. App. A-8).

Mulligan did not obtain tenure at OSU until 1979, more than three years after the campus specific limitation on tenure was adopted by the Board of Trustees.

SUMMARY OF ARGUMENT

Wilson v. Garcia, ___ U.S. ___ , 105 S. Ct. 1938 (1985) requires that the local state statute of limitations for personal injuries be applied to all § 1983 actions. In Ohio, that statute is § 2305.11, Ohio Revised Code, which provides a one-year statute of limitations.

The one-year statute of limitations was properly applied retroactively to Mulligan's claims. The statute of limitations applied did not overrule clear past precedent, serves the purpose of providing a uniform statute of limitations for all § 1983 actions, and does not produce an inequitable result in Mulligan's case. The complaint in this case was also barred by

the statutes of limitations that would have been applied prior to *Wilson.*

Mulligan was not deprived of a liberty interest protected by the due process clause by the allegedly defamatory letters placed in her personnel file, because she has not been terminated from employment.

Mulligan does not have a property interest protected by the due process clause because she does not have a legitimate claim of entitlement to university wide tenure.

Due process is available through the Ohio Court of Claims for Mulligan's claims of being denied liberty and property without due process of law.

ARGUMENT

I. The Decision Of The Court Of Appeals Is Consistent With This Court's Decision In *Wilson v. Garcia,* ___ U.S. ___, 105 S. Ct. 1938 (1985).

In *Wilson v. Garcia,* ___ U.S. ___, 105 S. Ct. 1938 (1985), the Court held that for all actions arising under 42 U.S.C. § 1983, a federal court must apply the personal injury statute of limitations of the state in which the court is sitting. The Court of Appeals in this case noted that in Ohio, there are two statutes of limitations that are applied to personal injury actions. *Mulligan v. Hazard,* 777 F. 2d 340, 343 (6th Cir. 1985). Section 2305.11, Ohio Revised Code provides a one-year limitation period for personal injury resulting from libel, slander, assault, battery, malicious prosecution and malpractice.[4] (App. 29). A less specific provision, § 2305.10, Ohio Revised Code, contains a two-year statute of limitations to recover for bodily

[4] Subsequent to the filing of this lawsuit, § 2305.11, Ohio Revised Code was amended to delete the torts of assault and battery, which were concurrently included in a new statute, § 2305.111, Ohio Revised Code. This section retains the one-year limitations period for these torts. (App. 34).

injury. (App. 27). Under Ohio law, a specific statute controls over a more general statute if a conflict is perceived between the two. § 1.51, Ohio Revised Code. (R. App. A-3).

The Court of Appeals reasoned that the one-year provision for the intentional tortious conduct of assault and battery was the more appropriate of these two statutes to apply to § 1983 actions. 777 F. 2d at 344. The Court relied directly on *Wilson* for this conclusion. There, the Court emphasized that the genesis for § 1983 as it originated in the Civil Rights Act of 1871 was the intentional assaults and batteries perpetrated against persons during the previous century.

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Brisco v. LaHue,* 460 U.S. 325, 336-340, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents:
>
> > "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong, 1st Sess, 374 (1871) (remarks of Rep. Lowe).

> By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement. ___ U.S. ___, 105 S. Ct. at 1947.

From this, it is apparent that not only is the Court of Appeals decision consistent with Wilson, but is indeed compelled by it.[5] By applying the Ohio statute of limitations for personal injuries resulting from intentional torts, "[i]t is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." ___ U.S. ___, 105 S. Ct. at 1949.

II. The Decision Of The Court Of Appeals Is Consistent With This Court's Decision In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

While *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) articulated three factors to be considered in determining the retroactive application of a statute of limitations, its continuing viability must be questioned in light of *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

In *DelCostello*, the Court retroactively applied a six month statute of limitations in an action by an employee against his employer and union. *DelCostello* established a uniform limitation period borrowed from federal law (§ 10b of the National Labor Relations Act) for such actions, where the previous borrowing of state statutes of limitations had resulted in varying limitations periods being applied, depending on the state whose statutes were borrowed and whether the action was against a union or an employer. This resulted in at least one of the petitioners in the case being barred from litigating his

[5] Even application of the two-year statute of limitations would not have preserved Mulligan's claim, since it arose in 1975, eight years before the complaint was filed.

claim against his union under the then-announced shorter limitation period, whereas under the existing application of a state statute of limitations his claim would not have been time-barred.

The Court did not discuss the three *Chevron* factors for determining retroactive application of a statute of limitations. Rather, the shorter statute of limitations was given direct and retroactive application to the petitioners in *DelCostello*.

Even if *Chevron* is still considered applicable to changes in statutes of limitations, the statute of limitations applied in this case is a proper subject for retroactivity. The first of the *Chevron* factors considers whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly established...." 404 U.S. at 106. Prior to the Court of Appeals' decision in this case, a variety of Ohio statutes of limitations had been applied to § 1983 actions, § 2305.07 (six years for employment discrimination) (App. 26) in *Mason v. Owens-Illinois, Inc.*, 517 F. 2d 520 (6th Cir. 1975); § 2305.09 (four years for search and seizure) (App. 27) in *Crawford v. Zeitler*, 326 F. 2d 119 (6th Cir. 1964); § 2305.11 (one year for false arrest and malicious prosecution) in *Kilgore v. City of Mansfield*, 659 F. 2d 632 (6th Cir. 1982); *Austin v. Bramer*, 555 F. 2d 142 (6th Cir. 1977); *Crawford v. Zeitler, supra;* and § 4112.051(A) (180 days for housing discrimination) (R. App. A-7) in *Sutton v. Bloom*, 710 F. 2d 1188 (6th Cir. 1983); *Warner v. Perrino*, 585 F. 2d 171 (6th Cir. 1978).

This diversity of statutes of limitations applied in civil rights actions by the Court of Appeals reveals that there was no clear past precedent that was overruled by the present case. Indeed, the total lack of uniformity indicates that there was no clear precedent at all. Since none of these cases were for a cause of action closely similar to the property claim made by Mulligan in this case, there was no previously existing statute of limitations case upon which she could have relied to

wait until 1983 to file a complaint for a cause of action she alleges accrued in 1975.[6]

The second *Chevron* factor looks to "whether retrospective operation will further or retard [the rule's] operation." 404 U.S. at 106-107. The rule announced in *Wilson* and applied in Ohio in *Mulligan,* applying a single statute of limitations to all § 1983 actions, serves the purpose of providing "uniformity, certainty and the minimization of unnecessary litigation." *Wilson,* ___ U.S. ___, 105 S. Ct. at 1947. As reviewed above, the prior experience in the Sixth Circuit alone amply demonstrates the need for a uniform statute of limitations. This important purpose will unquestionably be furthered by giving retroactive application to *Wilson* and *Mulligan.* It will hence be clear that all § 1983 claims will be subject to the same statute of limitations.

The third of the *Chevron* factors is whether applying the statute of limitations retroactively could produce a substantial inequitable result. 404 U.S. at 107. Retroactive application of a one-year statute of limitations would not produce an inequitable result in this case because Mulligan's claims were time-barred even under the statutes of limitation that would have been applied prior to *Wilson.*

Before *Wilson,* federal courts were to apply the most closely analogous state statute of limitations. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). Mulligan's claim of being denied property without due process accrued in 1975 when the OSU Board of Trustees passed a resolution making tenure campus specific. The same year, the campus specific provision was included in the Faculty Handbook made available to all faculty and incorporated by reference in Mulligan's NOA's.[7]

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[6] Even under *Board of Regents v. Tomanio,* 446 U.S. 483 (1980), which looked to the most closely analogous state limitations statute, § 2305.11, Ohio Revised Code would have been applied to Mulligan's liberty claim that false statements were made about her. This claim sounds in libel and is specifically included in § 2305.11.

[7] Mulligan's contention that her claim is continuing in nature is unavailing. The act of making tenure campus specific was a discrete and distinct occurrence that was completed in 1975. The act itself did not continue after 1975, only the result of the act. Tenure has remained campus specific since it was so designated in 1975.

Several possible statutes of limitations could have been applied to Mulligan's property claim. The most closely analogous may have been § 2305.10, Ohio Revised Code, which provides a two-year period for damages to personal property. Also possible would have been § 2305.09, Ohio Revised Code, a four-year catch-all provision for injury to the rights of a person. A further choice would have been the two-year period in § 2743.16, Ohio Revised Code for claims against the state if the property claim is considered in the nature of a breach of contract action.[8]

Mulligan's denial of liberty claim is in the nature or a libel action, which under Ohio law is "a false and malicious publication made with the intent to injure a person's reputation or expose him to public hatred, contempt, ridicule, shame or disgrace, or to affect him adversely in his trade or profession." *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.,* 43 Ohio App. 2d 105, 107 (1975). The most closely analogous Ohio statute of limitations is therefore § 2305.11, Ohio Revised Code, which provides a one year limitations period for libel. This would time-bar all of Mulligan's liberty claims with the exception of the allegedly defamatory April 8, 1983 letter excluded by the Court of Appeals from being barred by the statute of limitations. 777 F. 2d at 344-345.

Because the conclusion would have been the same in this case even under the pre-*Wilson* statute of limitations analysis, Mulligan is not subjected to an unfair and inequitable result by retroactively applying a one-year statute of limitations to her claims. Particularly with respect to her property claim, Mulligan cannot claim any injustice, since she waited until 1983 to file a complaint for a claim that accrued in 1975.

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[8] Mulligan's contract was with OSU, not with any of the named individual Respondents. The only state court where a breach of contract action could have been brought against OSU was the Ohio Court of Claims, which has exclusive state jurisdiction over actions against the state and its institutions. §§ 2743.02, .03, Ohio Revised Code. All such claims must be brought within the two-year period specified in § 2743.16, Ohio Revised Code.

Under no circumstances could § 2743.06, Ohio Revised Code (fifteen years for contract in writing) (App. 26) be applicable since Mulligan has been unable to demonstrate that any of the yearly written contracts she signed after 1975 and before she obtained tenure in 1979 contained a provision guaranteeing her university wide tenure.

For these reasons, the one-year statute of limitations was properly applied retroactively in this case.

III. Petitioner Was Not Deprived Of A Protected Liberty Interest.[9]

A public employee has a liberty interest that may be infringed where statements are made that "seriously damage his standing and associations in his community." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). This interest, however, can be implicated only where the employee has been terminated from employment.

Paul v. Davis, 424 U.S. 693 (1976) was a case where a person falsely identified as a shoplifter in a flyer sent by police to area merchants brought a § 1983 action against the police for deprivation of liberty without due process. While recognizing the plaintiff's allegations as a classic case of defamation, the Court refused to find an interference with a liberty interest. To reach this conclusion, the Court clarified its recognition of a public employee's liberty interest in *Roth.*

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.
>
> . . . .

[9] The remaining arguments in this brief were raised in the Court of Appeals, and although not discussed by that Court, can be asserted here to affirm the decision of the Court of Appeals. *Whitley v. Albers,* ___ U.S. ___, 106 S. Ct. 1078 (1986).

> Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee. *Paul,* 414 U.S. at 709-710.

Because Mulligan continues in employment at OSU even to this day, she could not have been deprived of a protected liberty interest by the documents in her personnel file referenced by the Court of Appeals. 777 F. 2d at 345.

IV. Petitioner Did Not Have A Protected Property Interest In University Wide Tenure To Serve As The Basis For A Claim Of Deprivation Of Property Without Due Process.

The inquiry into any due process claim requires a two part analysis: (1) whether the plaintiff was deprived of a protected life, liberty or property interest and (2) if there was a protected interest deprived, what process was due under the circumstances. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Ingraham v. Wright,* 430 U.S. 651 (1977). The requirements of due process do not apply unless the interest deprived is an interest protected by the Fourteenth Amendment. *Board of Regents v. Roth, supra.*

The due process clause itself does not create any property or liberty interests, but only extends procedural safeguards to certain independently existing interests. *Goss v. Lopez,* 419 U.S. 565 (1975); *Board of Regents v. Roth, supra.* These interests attain constitutional protection under the due process clause "by virtue of the fact that they have

been initially recognized and protected by state [or federal] law and . . . the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." *Paul v. Davis*, 424 U.S. at 710.

The concept of a property interest within the meaning of the due process clause was examined in detail by the Supreme Court in *Board of Regents v. Roth, supra.*

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. *Id.* at 576.
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.* at 577.

In order to assert a legitimate claim of entitlement, a plaintiff must be able to articulate a specific federally or state created property right that is derived from a statute, legal rule or mutually explicit understanding. *Leis v. Flynt,* 439 U.S. 438 (1979). If the property interest is alleged to have arisen under state law, the sufficiency of the claim of entitlement must be decided by reference to state law. *Bishop v. Wood,* 426 U.S. 341 (1976).

In this case, Mulligan contends that the OSU Board of Trustees' decision in 1975 to limit tenure to the campus where primary service is rendered deprived her of a property right in university wide tenure, eventhough she did not obtain tenure until 1979. She alleges that this deprived her of due process of law because she did not have notice and an opportunity to be heard before this decision was made. In order to prevail in this case, Mulligan must necessarily prove that she had more than an abstract need or desire for university wide tenure. She must be able to prove that she had a legitimate claim of entitlement to university wide tenure derived from a statute, legal rule or mutually explicit understanding.

The NOA's signed by Mulligan since the 1975-76 school year state that her employment is subject "to compliance with the laws of Ohio, the rules and regulations of the Board of Trustees, and the general personnel policies of the University." Rule 21.03 of the Rules of the University Faculty limits all appointments "for a period not to exceed four academic quarters" and clarifies that "neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment." Also, the Faculty Handbook at § 1.4 states that nontenured faculty are appointed on a probationary basis, with the appointments "for a one-year period." Section 1.4 also specifically states that the "Unversity does not assume any continuing obligation to renew the appointment of a nontenured faculty member." These provisions are "rules and regulations of the Board of Trustees" or "general personnel policies of the University" that Mulligan agreed were applicable when she signed her NOA's for employment at OSU.

These provisions from the Rules of the University Faculty and the Faculty Handbook and the fact that Mulligan signed a new contract for each of her years at OSU demonstrate that each contract Mulligan entered into with OSU was for a period of time of no more than one year. Each year prior to 1979 she signed a new contract and each contract expired at the end of the one year or less period of time specified in the contract. Since Mulligan did not obtain tenure until 1979, OSU had no obligation until tenure was granted to renew each contract upon its expiration. Because a new contract was entered into for each year, each contract was separate and distinct and was subject to the various rules and policies of OSU that were in effect when each contract was signed.

For the school years 1976-77, 1977-78 and 1978-79, Mulligan signed a new NOA for each year. Each of those contracts was signed after the Board of Trustees adopted the campus specific tenure provision on September 5, 1975 and after the campus specific provision was included in the 1975 Faculty Handbook.

It is therefore evident that after the Board of Trustees' September 5, 1975 resolution and the 1975 Faculty Handbook were in effect, the campus specific provision became incorporated into Mulligan's contracts subsequently executed. Mulligan remained free to sign her contrcts with OSU after tenure became campus specific or to seek employment elsewhere. When she signed contracts in 1976, 1977 and 1978 prior to obtaining tenure, each of those contracts incorporated the provision from the 1975 Faculty Handbook and the Board of Trustees' resolution that tenure was campus specific. With each contract she signed, she agreed that if she would obtain tenure in the future, she would hold tenure only at the campus where her primary service was being rendered, the Marion regional campus.

From the foregoing, there is no genuine issue as to whether Mulligan had a legitimate claim of entitlement, derived from a statute, rule or mutually explicit understanding, to university wide tenure. She had no contractual right to university wide tenure when she received tenure in 1979. Indeed, the mutually explicit understanding stated in her contract with OSU is that when she obtained tenure in 1979, it would be applicable only to the Marion regional campus. Her desire for university wide tenure is no more than an abstract need or unilateral expectation. Mulligan therefore has no property interest in university wide tenure within the meaning of the due process clause definition of property. Because she has no property interest, she cannot prevail on her claim of being denied property without due process of law.

V. Assuming Petitioner Had Protected Property And Liberty Interests, Due Process Was Available Through The Ohio Court Of Claims For An Alleged Deprivation Of Those Rights.

Assuming, *arguendo,* that Mulligan had a property right in university wide tenure, and assuming that OSU's articulation in 1975 that tenure was campus specific deprived here of that right, the deprivation did not occur without due process of

law because Ohio has available a remedy in the Ohio Court of Claims for the deprivation.

In *Parratt v. Taylor,* 451 U.S. 527 (1981),[10] the Court considered the question of whether due process is provided where there exists a post-deprivation remedy in a state claims procedure. The plaintiff in *Parratt* was a prison inmate who claimed a due process violation by prison officials who had negligently lost hobby materials sent to the prisoner. The Court found that three of the prerequisites of a valid due process claim had been met — the defendants acted under color of state law, the hobby kit was property, and the loss of the kit amounted to a deprivation. *Id.* at 536. The Court then determined whether the deprivation had occurred without due process. After reviewing its prior decisions where post-deprivation remedies were found to meet due process standards, the Court held that there could be no claim of being denied due process where a state provided a remedy to a person with a claim against a state employee.

> The State provides a remedy to persons who believe they have suffered tortious loss at the hands of the State. See Neb. Rev. Stat. § 81-8.209 *et seq.* (Reissue 1976). Through this tort claims procedure the state hears and pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question but respondent did not use it. It is argued that the State does not adequately protect the respondent's interests because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the

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[10] *Parratt* was overruled in *Daniels v. Williams,* ___U.S. ___, 88 L. Ed. 2d 662 (1986) only to the extent that *Parratt* had held that due process claims could be based on negligent conduct.

> state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process. *Id.* at 543, 544.

The allegations in this case are that OSU altered the terms of Mulligan's tenure by making tenure campus specific. In essence, Mulligan's allegations are that her contract with OSU has been breached.

Ohio provides a remedy for persons with breach of contract actions against a state university through the Ohio Court of Claims. Effective January 1, 1975, the State of Ohio created the Ohio Court of Claims and consented to suit in that Court. §§ 2743.02, .03, Ohio Revised Code. The Court of Claims functions as a court of record, has full equitable powers, and operates pursuant to the Ohio Rules of Civil Procedure. § 2743.03, Ohio Revised Code. Pursuant to these provisions, Mulligan could have filed a breach of contract action against OSU after tenure was made campus specific in 1975.

Similarly, Mulligan could have pursued her liberty claim as a defamation action in the Court of Claims.

Consistent with *Parratt,* due process was available to Mulligan for her alleged property and liberty deprivations.

CONCLUSION

For the above-stated reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

COUNSEL OF RECORD FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing brief in opposition to the petition for a writ of certiorari have been served upon Petitioner Linda Mulligan by forwarding copies to her counsel, Frederick G. Cloppert, Jr., 225 E. Broad St., Columbus, Ohio 43215 by United States Mail, postpaid, this _____ day of May, 1986. I further certify that all parties required to be served have been served.

GENE W. HOLLIKER
Assistant Attorney General

CASE NO. 85—1641

In The Supreme Court of the United States

OCTOBER TERM, 1985

LINDA MULLIGAN,
Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHERYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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OHIO REVISED CODE

§ 1.51 Special or local provision prevails over general; exception.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

§ 2743.02 [State waives immunity from liability.]

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) In any circumstance in which a claimant proves in the court of claims that an officer or employee, as defined in division (A) of section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that

the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2734.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivision which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorneys' fees, damage, loss or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his or her duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or if such hospital requests of the superintendent of insurance, shall recommend, a specific amount for any given period of time that in his opinion represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action except a civil action for one thousand dollars or less, that is filed in the court of claims.

§ 2743.03 [Court of claims created.]

(A) There is hereby created a court of claims. The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code, exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims and of determinations pursuant to sections 5315.04 and 5315.05 of the Revised Code, and jurisdiction to hear appeals from the decisions of the court of claims commissioners. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counter-claims, cross-claims, and third-party claims.

(B) The court of claims shall sit in Franklin county, its hearings shall be public, and it shall consist of incumbent judges of the supreme court, courts of appeals, or courts of common pleas, or retired judges eligible for active duty pursuant to division (C) of Section 6 of Article IV, Ohio Constitution, sitting by temporary assignment of the chief justice of the supreme court. The chief justice of the supreme court may direct the court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.

(C) A civil action against the state shall be heard and determined by a single judge. Upon application by the claimant or the state, the chief justice of the supreme court may assign a panel of three judges to hear and determine a

civil action presenting novel or complex issues of law or fact. Concurrence of two members of the panel is necessary for any judgment or order.

An appeal from a decision of the court of claims commissioners shall be heard and determined by one judge of the court of claims.

(D) The Rules of Civil Procedure shall govern practice and procedure in all actions in the court, except insofar as inconsistent with this chapter. The supreme court may promulgate rules governing practice and procedure in actions in the court as provided in Section 5 of Article IV, Ohio Constitution.

(E)(1) A party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims. The petition shall state the basis for removal, be accompanied by a copy of all process, pleadings, and other papers served upon the petitioner, and shall be signed in accordance with Civil Rule 11. A petition for removal based on a counterclaim shall be filed within twenty-eight days after service of the counterclaim of the petitioner. A petition for removal based on third-party practice shall be filed within twenty-eight days after the filing of the third-party complaint of the petitioner.

(2) Within seven days after filing a petition for removal, the petitioner shall give written notice to the parties, and shall file a copy of the petition with the clerk of the court in which the action was originally brought. The filing effects the removal of the action to the court of claims, and the clerk of the court where the action was brought shall forward all papers in the case to the court of claims. The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party.

(3) Bonds, undertakings, or security and injunctions, attachments, sequestrations, or other orders issued prior to removal remain in effect until dissolved or modified by the court of claims.

§ 2743.16 [Time of accrual of cause of action.]

Civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties. The period of limitations shall be tolled pursuant to section 2305.16 of the Revised Code, except there shall be no tolling during imprisonment unless the imprisoned person is of unsound mind.

§ 4112.051 Actions in a common pleas court.

(A) The rights granted by division (H) of section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of common pleas. No person shall be compelled to be a witness against himself. A civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occured.

1.3.1 Campus Assignment

The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.

It is the policy of the University to achieve and maintain the highest possible quality of programs on each of the several campuses. Decisions regarding the selection, salary, assessment, promotion, assignment, and responsibilities of a regional campus faculty member should reflect full cooperation between the Columbus academic unit, which is responsible for instruction, and the regional campus administration. All formal recommendations (e.g., appointments, nominations for promotions or tenure, etc.) must bear the signature of the chairman of the Columbus campus academic unit, the dean of the college of instruction, the director of the regional campus, and the vice president for regional campuses.

1.4 Probationary Service, Duration of Appointments

In Section 1.6, probationary periods are established for regular faculty members with the rank of instructor, assistant professor, and associate professor. In determining the years served in these probationary periods, the following will not be credited toward the attainment of tenure: service on an adjunct, clinical, visiting, or lecturer appointment; service (with any title) on a special appointment, or part-time service at a level of less than 50 percent total service (as specified in one or more concurrent notices of appointment) to the University.

The period of a leave of absence may not be credited in the probationary period unless there is a written agreement to so credit it. Such an agreement will require the approval of the dean and of the provost.

The appointment of a person to a nontenured regular faculty position is probationary in nature. Appointments during the probationary period are for a one-year period and faculty members are normally reviewed annually during this period. It is during this time that persons have an opportunity to prove themselves to their peers; their record of accomplishments forms the basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

The University does not assume any continuing obligation to renew the appointment of a nontenured faculty member. Nonrenewal may be based upon such factors as changing standards of competence within a discipline, an assessment of inadequate performance or insufficient development, or any one of a number of less defined academic, financial, or policy reasons. The nonrenewal of an appointment in and of itself, however, should not carry with it the implication of either incompetence or misconduct on the part of the faculty member.

Decisions affecting the nonrenewal of a probationary appointment may not be arbitrary or capricious, or carried out in violation of a faculty member's right to academic freedom. Faculty Rule 21.08 provides a procedural mechanism under which an aggrieved probationary faculty member can challenge a nonrenewal decision which he believes to have been improper. In that instance, however, the burden of proof is on the probationary faculty member to establish that the nonrenewal decision was improper.

RESOLUTION OF THE OSU BOARD OF TRUSTEES, SEPT. 5, 1975, § C.4

Campus Assignment

The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.

RULES OF THE UNIVERSITY FACULTY

21.03. Appointments and Continuing Employment; Conditions Upon.

Section 1. Upon nomination and recommendation by the president of the University, the Board of Trustees shall make all appointments to all positions within the University and approve the salaries therefor. Such appointments, for a period not to exceed four academic quarters, shall be evidenced by a notice of appointment signed by the Secretary of the Board and sent to the appointee for acceptance. The notice of appointment form is a budgetary convenience containing some detail relating to the employment relationship during the term of the appointment, such as salary, title, and the quarters during which service is to be rendered. The form is used for appointment to many and varied kinds of service, including appointment to positions which may be tenure accruing and others which are not. Neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

LINDA MULLIGAN *v.* FRANCIS HAZARD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-1641. Decided June 9, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Wilson* v. *Garcia*, —— U. S. —— (1985), we held that an action brought under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. Since our decision in that case, the courts of appeals have differed on whether *Wilson* should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that *Wilson* should be given retroactive effect. 777 F. 2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. *Gates* v. *Spinks*, 771 F. 2d 916 (CA5 1985), cert. denied, —— U. S. —— (1986); *Jones* v. *Preuit & Mauldin*, 763 F. 2d 1250 (CA11 1985), cert. denied, —— U. S. —— (1986). Two other courts of appeals, however, have determined that when retroactive application would shorten the statute of limitations, *Wilson* merits only prospective relief. *Gibson* v. *United States*, 781 F. 2d 1334 (CA9 1986); *Jackson* v. *City of Bloomfield*, 731 F. 2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied *Wilson* retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See *Wycoff* v. *Menke*, 773 F. 2d 983, 986–987 (CA8 1985); *Fitzgerald* v. *Larson*, 769 F. 2d 160, 162–164 (CA3 1985); *Smith* v. *City of Pittsburgh*, 764 F. 2d 188, 194–196 (CA3 1985).

In addition, the courts of appeals also have reached conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury

actions. In *Hamilton* v. *City of Overton Park*, 730 F. 2d 613 (1984) (*en banc*), cert. denied —— U. S. —— (1985), and *Mishmash* v. *Murray City*, 730 F. 2d 1366 (1984) (*en banc*), cert. denied, —— U. S. —— (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a state's residual statute of limitations. See generally *Preuit & Mauldin* v. *Jones*, —— U. S. ——, —— - —— (1986) (WHITE, J. dissenting from the denial of certiorari). The Eleventh Circuit in *Jones* v. *Preuit & Mauldin*, *supra*, the Fifth Circuit in *Gates* v. *Spinks*, *supra*, and the Sixth Circuit in the present case, however, follow a different rule, and select the state state statute of limitations governing intentional torts.

The Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the courts of appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the circuits, and the frequency with which these cases arise, I would grant the petition for certiorari in this case.